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In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. 2710 (d)(7)(A)(i), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether *Ex parte Young*, 209 U.S. 123 (1908), permits a suit against the Governor of a State arising from the State's failure to negotiate (through the Governor) an Indian gaming compact in good faith.

2. Whether Congress has authority under the Constitution to abrogate a State's immunity from a suit by a Tribe for declaratory and ancillary injunctive relief arising from the State's failure to negotiate in good faith.

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INTEREST OF THE UNITED STATES

This case involves a challenge to the constitutionality of a section of the Indian Gaming Regulatory Act (IGRA) that provides for suits in federal court by an Indian Tribe arising from the failure by a State to negotiate in good faith concerning a tribal-state compact governing certain gaming on Indian land. See 25 U.S.C. 2710(d)(7)(A)(i). The Secretary of the Interior has substantial responsibilities under IGRA, including the authority to approve all tribal-state gaming compacts, to disapprove them in certain circumstances, and to prescribe gaming regulations when a Tribe and a State are unable to conclude a compact. 25 U.S.C. 2710(d)(7)(B)(vii), 2710(d)(8). In response to this

Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162 and 28 U.S.C. 1360) nor the Organized Crime Control Act of 1970 (18 U.S.C. 1955) authorized California to enforce its gaming laws against Indian Tribes operating bingo and poker games on their reservations, because the relevant state gaming laws were "civil/regulatory" rather than "criminal/prohibitory" in nature. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. Pet. App. 3a.[1] At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq*.

IGRA's purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those

[1] See also 25 U.S.C. 2701(5) (finding that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person, organization or entity," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is located in a State that permits such gaming, is authorized by a tribal ordinance that satisfies the requirements for a class II ordinance, and is "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1). A tribal-state compact may address such matters as standards for the conduct of the gaming, the application of state or tribal criminal and civil laws, assessments to defray the costs of state regulation, taxation by the Tribe, and remedies for breach of contract. 25 U.S.C. 2710(d)(3)(C). The Secretary of the Interior is authorized to approve any tribal-state

compact and may disapprove such a compact only if it violates IGRA, any other provision of federal law, or the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8).

To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A). Congress also provided for judicial consideration of a Tribe's allegation that a State has failed to fulfill that responsibility. Specifically, "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the Tribe's request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." *Ibid.* In determining whether a State has negotiated in good faith, the district court may consider such factors as the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming. 25 U.S.C. 2710(d)(7)(B)(iii)(I). A State's demand for taxing authority is evidence of bad faith. 25 U.S.C. 2710(d)(7)(B)(iii)(II).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If they do not

do so, the Tribe and the State each must submit to a mediator appointed by the district court a proposed compact that represents "their last best offer." 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then must select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent to that compact. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents to the compact selected by the mediator, it is treated as a tribal-state compact entered into by agreement. 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida wrote to the Governor of Florida requesting the State to commence negotiations for a compact governing class III gaming operations proposed by the Tribe. Pet. App. 44a. The State was willing to negotiate concerning the forms of class III gaming specifically permitted by state law: card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over forms of gaming prohibited by state law, such as casino gambling. For that reason, negotiations broke down. *Id.* at 45a-46a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor, alleging that they had failed to conduct good faith negotiations as required by

IGRA. J.A. 18a. The Tribe specifically alleged that by refusing to negotiate concerning casino gambling, the State had breached its duty under IGRA to negotiate concerning "such gaming" as the State "permits * * * for any purpose by any person, organization or entity." 25 U.S.C. 2710(d)(1)(B). The Tribe asserted that the phrase "such gaming" should be interpreted generically rather than in a game-specific way, so that the State's allowance of some forms of class III gaming required the State to negotiate concerning all forms of class III gaming, including casino gambling. Pet. App. 54a-55a. The Tribe also asserted that Florida "permits" casino gambling because it fails to enforce its gaming laws against charities that hold casino nights. *Id.* at 61a. The Tribe sought a declaratory judgment that IGRA requires the State to negotiate concerning casino gambling; an order requiring the State, acting through the Governor, to conclude a tribal-state compact within 60 days; and appointment of a mediator to resolve any impasse. J.A. 18a-19a.

The State and the Governor filed a motion to dismiss the complaint on the ground that the Eleventh Amendment barred the Tribe's suit. Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA" and that "pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." *Id.* at 30a.

3. The court of appeals reversed the district court's order denying the motion to dismiss. Pet. App. 1a-25a. The court agreed with the district court that "Congress intended to abrogate the states' sovereign immunity," reasoning that "unless Congress intended to abrogate the states' immunity," IGRA's grant of jurisdiction over

claims that a State has not negotiated in good faith "would be of no effect." *Id.* at 14a-15a.

The court of appeals went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in order to 'maintain[] free trade among the States[,]' * * * 'the central function of the Indian commerce clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" Pet. App. 21a (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." Pet. App. 21a. Second, the court of appeals observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against the Governor of a State to require good faith negotiations

under IGRA. The court believed that, under IGRA, a State has discretion over the terms of a compact as well as the decision whether to negotiate, and that the *Ex parte Young* doctrine "cannot be used to compel an executive official to undertake a discretionary task." Pet. App. 23a-24a. The court also concluded that *Ex parte Young* was inapplicable because the Tribe's suit "is, in reality, against the state." Pet. App. 23a, 24a. The court explained that IGRA "uniformly addresses itself to 'the State'; not once does it impose duties or responsibilities on a particular officer of the state (e.g., the governor, the legislature, etc.)." *Id.* at 24a. The court therefore remanded with directions to dismiss the suit. *Id.* at 25a.[2]

SUMMARY OF ARGUMENT

A. The Tribe's suit against the Governor is permissible under *Ex parte Young*, 209 U.S. 123 (1908). In *Ex parte Young*, the Court held that a federal court could award prospective relief to require a state official to comply with federal law. The Court has repeatedly reaffirmed that holding. In this case, the Tribe alleged that the Governor has failed to negotiate a gaming compact in good faith as

[2] While the appeal from the order denying the motion to dismiss the complaint was pending in the court of appeals, the district court rejected the Tribe's claims on the merits and entered final judgment in favor of the State and its Governor. Pet. App. 43a-83a. The district court held that IGRA's duty to negotiate is game-specific, and that the State's operation of a lottery and its allowance of pari-mutuel wagering therefore did not require the State to bargain concerning casino gambling. *Id.* at 55a-58a. The court also held that the exercise of prosecutorial discretion not to enforce gaming laws against charities that hold casino nights does not mean that the State "permits" such gaming within the meaning of IGRA. *Id.* at 69a-75a. The Seminole Tribe has appealed that judgment, but that appeal has been stayed pending the decision by this Court on the Eleventh Amendment issue. Pet. App. 84a.

required by the Indian Gaming Regulatory Act (IGRA), and it sought declaratory and injunctive relief to require the Governor to comply with that obligation. If a federal court were to agree that the Governor had failed to negotiate in good faith as required by federal law, an award of declaratory relief to that effect and an order requiring the Governor to participate in IGRA's narrowly tailored remedial procedures would reflect a straightforward application of *Ex parte Young*.

The court of appeals failed to rely on *Ex parte Young* on the ground that its rationale cannot be invoked to compel a discretionary act. Under IGRA, however, once a Tribe requests a State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). That language creates a mandatory duty to negotiate in good faith.

The court also concluded that *Ex parte Young* was inapplicable because the Tribe's suit is really against the State. But the Tribe named the Governor as a defendant and has sought relief against him. And while the State is the real party in interest, that is true in all *Ex parte Young* suits. Because a State can only negotiate through its officials, the obligation under IGRA to negotiate must be understood to fall upon the state officials who have authority under state law to negotiate. In this case, the Governor has such authority. Accordingly, under *Ex parte Young*, a suit for prospective relief may be brought against the Governor if he has not complied with his obligation to negotiate in good faith.

B. The Tribe's suit against the State is not precluded by the Eleventh Amendment because Congress constitutionally abrogated the State's immunity from suit. In *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), the Court held that Congress has the power under the Interstate Commerce Clause to authorize federal courts

to award monetary relief against the States. Congress's power to regulate Indian commerce is rooted in the same Clause as its power to regulate interstate commerce, and it is at least as broad in scope. Congress therefore also has the power under the Indian Commerce Clause to abrogate a State's immunity from suit.

The IGRA provision at issue here stands on an even firmer constitutional footing than the provision at issue in *Union Gas*. First, Congress's powers are augmented in this context by its special responsibility and authority with respect to the Indian Tribes. Second, IGRA does not authorize monetary relief. Instead, it does no more than authorize the kind of relief against the State that *Ex parte Young* authorizes against a state official. Third, IGRA affords a cause of action only to Indian Tribes. Suits brought by another sovereign do not implicate the values underlying the Eleventh Amendment to the same extent as suits by individuals. Finally, the provision at issue here is part of a broader scheme that is designed in part to enhance the States' power to regulate Indian gaming. Congress believed that granting additional authority to the States would be inequitable to the Tribes, unless the Tribes could enforce the States' obligation to negotiate in good faith.

The court of appeals sought to distinguish *Union Gas* on the ground that Congress's power to regulate Indian commerce serves different purposes than does Congress's power to regulate interstate commerce. The critical point in *Union Gas*, however, was that the States ceded a portion of their sovereignty when they gave Congress plenary power to regulate interstate commerce. In adopting the Constitution, States also ceded whatever authority they had over Indian affairs.

The court of appeals also sought to limit *Union Gas* to activities that do not fall within the traditional sphere of

state authority. But the Court in *Union Gas* did not mention that factor in its analysis, and this Court has squarely rejected such an approach in the Tenth Amendment context. In any event, negotiating a compact with a Tribe is not a traditional state activity. Historically, States have reached agreements with Tribes under federal auspices, and IGRA is consistent with that tradition.

ARGUMENT

THE ELEVENTH AMENDMENT DOES NOT PRECLUDE A SUIT BY AN INDIAN TRIBE AGAINST A STATE OR ITS GOVERNOR UNDER THE INDIAN GAMING REGULATORY ACT ARISING FROM THE STATE'S FAILURE TO NEGOTIATE A GAMING COMPACT IN GOOD FAITH

The Indian Gaming Regulatory Act (IGRA) provides that "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Relying on that provision, the Seminole Tribe filed suit against the State of Florida and its Governor alleging that they had not engaged in good faith negotiations. The Tribe sought declaratory relief and an order directing the State, through its Governor, to enter into good faith negotiations. The court of appeals held that the Eleventh Amendment precludes the Tribe's suit. That holding is incorrect. The Tribe's suit against the Governor is permissible under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and its suit against the State is

permissible because Congress has authority to abrogate the State's immunity from suit by a Tribe under IGRA.

A. The Tribe's Suit Against The Governor Is Permissible Under *Ex Parte Young*

1. The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court has not interpreted the Eleventh Amendment in accordance with its literal terms. Instead, the Court has viewed the Amendment as confirmation of a broader principle: that States entered the Union with their immunity from suit intact, and the grant of judicial power in Article III to adjudicate claims against the States did not eliminate that immunity. See *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991). Thus, notwithstanding the absence of a textual basis in the Eleventh Amendment, the Court has applied the principle that a State is immune from suit absent its consent in suits by citizens against their own State arising under federal law, *Hans* v. *Louisiana*, 134 U.S. 1 (1890), and in suits brought by sovereigns like Indian Tribes and foreign nations. *Blatchford*, *supra*; *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934).

When a suit is brought against a state official, a question arises whether it should be treated as a suit against the State itself. The general rule is that a suit against a state official must be treated as a suit against a State when the State is the real party in interest, *i.e.*, when the relief would operate against the State.

Pennhurst State School & Hosp. v. *Halderman*, 465 U.S. 89, 107, 109 n.17 (1984). An important exception to that rule is that sovereign immunity does not preclude a suit against a state official to secure compliance with federal law. That exception was first announced in *Ex parte Young*, 209 U.S. 123 (1908). There, the Court held that a federal court could enjoin a state Attorney General from enforcing an unconstitutional state statute. The theory of *Ex parte Young* was that an unconstitutional statute is void and therefore cannot immunize a state official from suit. *Id.* at 159-160. Because the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." *Id.* at 160.

In *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974), the Court declined to extend the holding of *Ex parte Young* to suits for retroactive monetary relief. The Court reaffirmed in *Edelman*, however, that a federal court may enter an injunction that governs an official's future conduct. *Id.* at 667-668. Since *Edelman*, the Court has continued to maintain that distinction: prospective relief to secure future compliance with federal law is permissible, while retroactive monetary relief to remedy past wrongs is not. See, *e.g.*, *Puerto Rico* v. *Branstad*, 483 U.S. 219, 227-228 (1987); *Papasan* v. *Allain*, 478 U.S. 265, 276-279 (1986); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977). The rationale for that approach is that while both prospective and retroactive relief implicate Eleventh Amendment concerns, prospective relief is necessary to give life to the Supremacy Clause. *Green*, 474 U.S. at 68. Thus, "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Ibid.* On the other hand, "com-

pensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Ibid.*

2. The Tribe's suit against the Governor fits squarely within the rationale of *Ex parte Young*. The Tribe has alleged that the Governor has failed to negotiate in good faith as required by IGRA, and the Tribe has sought declaratory and injunctive relief to require the Governor to comply with that obligation. J.A. 18a-19a. Resolution of the Tribe's claim on the merits turns entirely on an issue of statutory construction. IGRA requires a State to bargain over "such gaming" as the State "permits" * * * for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B). The Tribe contends that the phrase "such gaming" should be construed generically rather than in a game-specific way, so that Florida's operation of a lottery, which is a class III game, requires the Governor to bargain over all forms of class III gaming, including casino gambling. Pet. App. 54a-55a.[3] The Tribe also contends that Florida "permits" casino gambling within

[3] Other suits by a Tribe against a State under IGRA have also involved a legal issue concerning the proper construction of IGRA's requirement that the State negotiate about "such gaming" as state law "permits." *E.g.*, *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 41 F.3d 421, 425-426 (9th Cir. 1994); *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 278-279 (8th Cir. 1993); *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991); *Sault Ste. Marie Tribe of Chippewa Indians* v. *Michigan*, 800 F. Supp. 1484, 1486 (W.D. Mich. 1992), appeal dismissed, 5 F.3d 147 (6th Cir. 1993); *Yavapai-Prescott Indian Tribe* v. *Arizona*, 796 F. Supp. 1292, 1294, 1296 (D. Ariz. 1992); *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Wisconsin*, 770 F. Supp. 480, 484-488 (W.D. Wis. 1991), appeal dismissed, 957 F.2d 515 (7th Cir.), cert. denied, 113 S. Ct. 91 (1992). The courts of appeals that have squarely addressed the issue have agreed with the game-specific position of Florida in this case. *Rumsey*, 41 F.3d at 425-426; *Cheyenne River Sioux Tribe*, 3 F.3d at 278-279.

the meaning of IGRA because it fails to enforce its gaming laws against charities that hold casino nights. *Id.* at 61a. If a federal court were to agree with the Tribe's interpretation of IGRA, a declaratory judgment to that effect and an order requiring the Governor to negotiate on the basis of such a legal interpretation would reflect a straightforward application of *Ex parte Young*.[4]

3. The court of appeals nevertheless concluded that *Ex parte Young* is inapplicable here. In the court's view, *Ex parte Young* does not apply if a suit seeks "to compel an executive official to undertake a discretionary task" or if the suit "is, in reality, against the state." Pet. App. 23a. The Tribe's suit, the court concluded, "fit[s] into both categories." *Ibid.* That reasoning is unpersuasive.

a. The court of appeals concluded that the relief sought in this case would require the Governor to perform a discretionary act because IGRA permits the State to exercise discretion in proposing the terms of any tribal-state compact. Pet. App. 23a. IGRA limits the State's discretion, however, in one significant respect. Once a Tribe requests a State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). That statutory language

[4] In many instances, it might not be necessary for a district court to go beyond an award of declaratory relief, especially where the basis of the dispute between the State and the Tribe concerns an interpretation of IGRA itself. If (as in this case), the district court agrees with the State's interpretation of IGRA that underlies its failure to negotiate about particular games, the court would have no occasion to order the State (or its Governor) to negotiate. On the other hand, if the court agrees with the Tribe's interpretation of IGRA, the Governor might then agree to negotiate under IGRA as so construed, without any need for a judicial order directing him to do so. Such declaratory relief against a Governor regarding the scope of IGRA would be particularly far removed from the concerns that underlie the Eleventh Amendment.

creates a mandatory duty to negotiate in good faith. A State's refusal to fulfill that duty is a violation of federal law. Thus, although a federal court has no authority to interfere with the State's discretion to propose or agree to particular terms of a compact, it may, under *Ex parte Young*, order the Governor to negotiate in good faith. Such an order does not interfere with the Governor's discretion, because the Governor has no discretion under IGRA to negotiate other than in good faith. See *Ex parte Young*, 209 U.S. at 159 ("An injunction to prevent [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of [that] officer."); cf. *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 487-488 (1960) (obligation under Section 8(d) of National Labor Relations Act, 29 U.S.C. 158(d), to "confer in good faith" creates mandatory "duty" to bargain).

As the court of appeals noted (Pet. App. 23a), IGRA prescribes remedial procedures if the district court finds that the Governor has failed to negotiate (or to do so in good faith). The first step is for the court to order the State and the Tribe to conclude a compact within a 60-day period. 25 U.S.C. 2710(d)(7)(B)(iii). If they fail to do so, a mediator appointed by the court is authorized to choose between proposals submitted by the Tribe and the State; if the State submits no proposal, the mediator presumably would choose the Tribe's proposal by default. 25 U.S.C. 2710(d)(7) (B)(iv). Finally, if the State refuses to consent to the mediator's choice, the Secretary has authority to prescribe rules governing class III gaming on the Tribe's lands, subject to conditions prescribed by IGRA. See 25 U.S.C. 2710(d)(7)(B)(vii). Contrary to the court of appeals' view (Pet. App. 23a), the existence of those back-up remedial procedures does not mean that the decision whether to negotiate in the first instance is discretionary. Moreover, a Governor's refusal to participate in IGRA's

remedial procedures would have substantial consequences for the State, because the State would thereby lose its statutory right and practical ability under IGRA to shape the scope of gaming that will be permitted.

The federal duty under IGRA to negotiate about gaming is thus best understood as a conditional one: If the State wishes to preserve its opportunity to shape the scope of gaming, it must negotiate with the Tribe in good faith concerning a compact. Nothing in *Ex parte Young* precludes a federal court from ascertaining whether a Governor has complied with such a conditional duty and from invoking IGRA's narrowly tailored remedial procedures if the Governor has not done so. Indeed, such relief is far less intrusive on state prerogatives—and therefore poses far less of a threat to the values underlying the Eleventh Amendment—than relief granted in suits under *Ex parte Young* to enforce substantive and continuing legal obligations imposed on state officials under federal laws.

Duties imposed under the Spending Clause provide a useful analogy. A State is obliged to fulfill federal statutory requirements enacted pursuant to the Spending Clause only if the State opts to receive federal money. Accordingly, a State willing to forgo receipt of federal money can avoid complying with the federal requirements. The conditional nature of the State's duty, however, does not serve as a barrier to the award of prospective relief under *Ex parte Young* in Spending Clause cases so long as the State continues to receive funding. See *Quern*, 440 U.S. at 346-349 (approving prospective relief under *Ex parte Young* in Spending Clause case). There likewise is no reason why the conditional nature of the duty should serve as a barrier under IGRA.

b. The court of appeals' view (Pet. App. 24a) that *Ex parte Young* is inapplicable because the Tribe's suit is

really against the State is also without merit. The Tribe named the Governor as a defendant and sought relief against him. And while the State is the real party in interest, that is true in all *Ex parte Young* suits. *Pennhurst*, 465 U.S. at 107-109 & n.17; see also *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The whole point of *Ex parte Young* is that relief nevertheless may be ordered against a state official to comply with federal law. As explained in *Pennhurst*, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young*, "notwithstanding the obvious impact on the State itself." 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes obligations on the State, and not on any particular state official. Pet. App. 24a. States, however, can act only through their officials. See *Pennhurst*, 465 U.S. at 114 n.25. The obligations that IGRA places on the States therefore must be understood to fall not only upon the States but also upon those officials vested with authority under state law to negotiate on behalf of the States.

In that respect, IGRA is similar to the Fourteenth Amendment, which imposes duties directly upon the States and does not specifically refer to state officials. This Court long ago held that the duties of the Fourteenth Amendment nonetheless fall upon state officials as well. As the Court explained in *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286 (1913), "the provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power." See also *Pennhurst*, 465 U.S. at 105 ("an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment").

In this case, there is no dispute that the Governor is the state official vested with authority under the constitution and laws of Florida to negotiate on behalf of the State with the Seminole Tribe. The duty that IGRA imposes on the State to negotiate in good faith therefore falls upon the Governor. A determination by a federal court that the Governor has failed to fulfill that federal obligation, thereby triggering the remedial provisions of IGRA, is permissible under *Ex parte Young*.[5]

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[5] Should this Court hold that judicial relief focused on the alleged failure by the Governor to negotiate in good faith is permissible under *Ex parte Young*, there may be no need to resolve the question whether Congress may abrogate the immunity of the State itself in this setting. A judicial determination that the Governor has failed to negotiate in good faith on behalf of the State—and a resulting order directed to the Governor under IGRA's special remedial procedures of further negotiation, mediation, and (if necessary) the promulgation of rules by the Secretary—would presumably provide complete relief to the Tribe. Thus, if this Court makes clear that a suit against the Governor is permissible under *Ex parte Young*, the Tribe might be willing to forgo seeking relief directly against the State, and the Court (or the courts below on remand) might in any event conclude that relief against the State should be denied as a matter of equitable discretion. Accordingly, if the Court concludes that a suit against the Governor is permissible under *Ex parte Young*, it may be appropriate to reverse the judgment of the court of appeals on that basis alone, without reaching the question whether the Eleventh Amendment forecloses Congress from providing for a suit for prospective relief against the State itself.

B. Congress Has The Power Under The Constitution To Provide For A Suit By An Indian Tribe Against A State For Prospective Relief Arising From The State's Failure To Negotiate In Good Faith

Congress may abrogate a State's immunity from suit "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). Congress did that here. IGRA provides that a federal court shall have jurisdiction over any cause of action arising from "the failure of a State to enter into negotiations with the Indian tribe." 25 U.S.C. 2710(d)(7)(A)(i). IGRA further provides that once the Tribe introduces evidence that the State has not negotiated in good faith, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii). Finally, IGRA provides that if "the court finds that the State has failed to negotiate in good faith * * *, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(b)(iii). Those repeated textual references to the State are sufficient to show that Congress clearly intended to abrogate the State's immunity from suit.

The court of appeals agreed that Congress had clearly expressed its intent to abrogate the State's immunity from suit. Pet. App. 14a-15a. It held, however, that Congress lacked authority to effect such a waiver. *Id.* at 15a-22a. That holding is incorrect.

1. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held for the first time that Congress possesses power in some circumstances to abrogate a State's immunity from suit. At issue in *Fitzpatrick* was the constitutionality of Congress's grant of jurisdiction to federal courts to award retroactive monetary relief against States that discriminate in their employment

practices in violation of Title VII of the Civil Rights Act of 1964. 427 U.S. at 447-448. This Court held that Congress has the power under Section 5 of the Fourteenth Amendment to authorize federal courts to award such relief against the States. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456.

In *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), the Court rejected an Eleventh Amendment challenge to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, which subjects States to liability for the clean-up costs of hazardous waste sites they have contaminated. The Court held that Congress has the power under the Interstate Commerce Clause to authorize federal courts to award such relief against the States. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point * * * is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17. Because the States ceded plenary power over interstate commerce to Congress, the plurality concluded, the States also "relinquished their immunity where

Congress found it necessary, in exercising this authority, to render them liable." *Id.* at 19-20.[6]

2. It follows *a fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Indian Commerce Clause (a component of Art. I, § 8, Cl. 3), the Clauses giving the President and the Senate exclusive power to make treaties (Art. II, § 2, Cl. 2; Art. I, § 10, Cl. 1), and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959) (citing *United States* v. *Kagama*, 118 U.S. 375 (1886)). Congress's power to regulate Indian commerce is rooted in the same Clause as its power to regulate interstate commerce. And like the interstate component of that Clause, the Indian component is a plenary grant of authority. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989). Accordingly, Congress's power to provide for suits against States under the Indian Commerce Clause "cannot be less than its authority [to do so] under the Interstate Commerce Clause." *Spokane Tribe of Indians* v. *Washington*, 28 F.3d 991, 997 (9th Cir. 1994).

The background and history of the Indian component of the Commerce Clause confirm that Congress's power under that component is at least as broad as its power under the Interstate component. One of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the

[6] Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor[] to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." *The Federalist* No. 42, at 268-269 (C. Rossiter ed. 1961). Georgia and North Carolina relied upon the proviso giving States authority within their own limits to treat with Indians regarding their land and other matters. The effect of that construction of the proviso was "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). That construction of the proviso also created the potential for individual States to undermine the States' collective commitments to the Indians and the security of the United States.

In response to those difficulties, the States, in the Constitution, ceded to the United States all authority to manage affairs with the Indian Tribes. Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester*, 31 U.S. (6 Pet.) at 561 ("The whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States.").

Thus, the Indian Commerce Clause, perhaps even more than the Interstate Commerce Clause, grants broad power to Congress over a specified domain of public affairs and simultaneously takes power away from the States. It

follows that under *Union Gas*, the authority of Congress to abrogate state sovereignty under the former Clause, as under the latter, is rooted in the plan of the Constitutional Convention. See 491 U.S. at 19-20.

3. Several considerations support the conclusion that the provision for suits by Tribes against States under IGRA stands on even firmer constitutional footing than the provision at issue in *Union Gas*. First, Congress's power over Indian affairs does not stem from the Commerce Clause alone. It stems as well from the historical recognition that the Indian Tribes, though sovereign, "*are* the wards of the nation," and that from "the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." *Kagama*, 118 U.S. at 383-384. The United States (on behalf of all the States) has a special responsibility to the Tribes to further their economic well-being and amicable dealings with the States. That special responsibility reinforces the authority of Congress to provide for a Tribe, as a dependent sovereign, to bring an action against a State arising out of the State's failure to negotiate in good faith with the Tribe about a compact governing gaming on the Tribe's land—a matter frequently of central importance to the Tribe and its members.

Second, there is an important difference in the scope of relief authorized under the statute at issue in *Union Gas* and that authorized under IGRA. The provision at issue in *Union Gas* subjected the States to suit for money damages. In contrast, a suit under IGRA cannot result in the imposition of monetary relief; only prospective relief is authorized. This Court recently identified protection of state treasuries from federal court decrees as both "the impetus for the Eleventh Amendment" and "the most important consideration in resolving an Eleventh

Amendment immunity issue." *Hess* v. *Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394, 404, 406 (1994) (internal quotation marks omitted). Thus, IGRA does not threaten the core value underlying the Eleventh Amendment.

Moreover, the effect of IGRA is simply to authorize a suit against a State in circumstances in which *Ex parte Young* would authorize a suit against a state official. Whatever the precise scope of Congress's power to abrogate a State's immunity from suit, it must include at least that much. After all, the State is already the real party in interest in an *Ex parte Young* suit. *Pennhurst*, 465 U.S. at 101-102, 104. The notion that an *Ex parte Young* suit is not against the State is a legal "fiction." *Id.* at 105. There is no constitutional impediment to Congress's dispensing with that legal fiction and authorizing what would otherwise be an *Ex parte Young* suit against the State in its own name.

That is particularly true given the limited nature of the relief authorized by IGRA. While IGRA provides for a court to order a State and a Tribe to conclude a compact within 60 days as a remedy for the State's failure to negotiate in good faith, there is no indication that the State's failure to agree to a compact (or even to participate in negotiations) during that period was intended to expose the State to any more intrusive order or to contempt. Compare *Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978) (per curiam). Instead, as already noted, should the State decide not to participate in the remedial process of negotiation and mediation, the statutorily specified consequence is that the Secretary of the Interior will ultimately determine the scope of gaming on the Tribe's lands, taking into account the compact that is proposed by the Tribe (and presumably recommended by the mediator).

Yet another difference between *Union Gas* and this case is that the statutory provision upheld in that case grants a cause of action against the State to any individual, while the provision at issue here affords a cause of action only to Indian Tribes. Indian Tribes are sovereigns, *Blatchford*, 501 U.S. at 780, and a suit by a sovereign against a State does not implicate a State's dignity to the same extent as a suit by an individual against a State. See *Hess*, 115 S. Ct. at 400, 406 (one purpose of the Eleventh Amendment is to protect a State's integrity and dignity). There is also considerable historical evidence that the primary purpose of sovereign immunity was to protect States from suits brought by individuals rather than sovereigns. *Blatchford*, 501 U.S. at 780 n.1.

It is true that the Court held in *Monaco* that the Eleventh Amendment applies in a suit brought by a foreign nation against a State. And the Court similarly held in *Blatchford* that the Eleventh Amendment applies in a suit brought by a Tribe. But neither case involved the power of Congress to authorize a suit by another sovereign. The "plan of the convention," *Monoco*, 292 U.S. at 322-323, would provide Congress a firm basis for authorizing a foreign government to sue a State in federal court if it determined that such action was necessary to the conduct of foreign relations and commerce—*e.g.*, to conform the practice in suits involving foreign sovereigns to international norms. Compare *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983) (Foreign Sovereign Immunities Act of 1976 codifies restrictive theory of foreign sovereign immunity that had been adopted by other nations). The parallel structure of the Commerce Clause—vesting in Congress the power to regulate Commerce "with foreign Nations" and "with the Indian Tribes"—indicates that the Framers contemplated bilateral relations between the United States and the

Indian Tribes as distinct sovereign entities, just as they contemplated such relations with foreign nations. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982); see also *Worcester*, 31 U.S. (6 Pet.) at 559. That parallel structure also reflects the fact that, just as it was important to the security of the United States to vest authority in the national government over relations with foreign governments, so too it was important to the security of the United States to vest authority in the national government over relations with the Indians. For those reasons, Congress should have no less authority to authorize Indian Tribes to sue the States than it would have to authorize such suits by foreign nations.

The rationale of *Monaco* and *Blatchford* is inapplicable in this context in any event. Those cases declined to find an abrogation of the State's immunity from suit implicit in the Constitution itself because the Constitution could not be understood to have waived either a foreign government's or a Tribe's immunity from a suit brought by a State. *Blatchford*, 501 U.S. at 781-782. The absence of "mutuality" made it inappropriate to treat the States as having waived their immunity from a suit brought by a foreign government or a Tribe. *Id.* at 782. Congress, however, does have the authority to subject foreign governments and Tribes to suits by States. If mutuality is to be preserved, Congress should also have the power to authorize suits by foreign governments and Tribes against States.

Finally, unlike the situation in *Union Gas*, the abrogation of sovereign immunity in IGRA is part of a broader statutory scheme that is designed in part to enhance state authority. The Senate Report accompanying IGRA explained the reasons for including a provision that would waive the State's immunity from suit as follows:

This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealings with tribes in class III gaming negotiations.

S. Rep. No. 446, 100th Cong., 2d Sess. 14 (1988). The Constitution should not be interpreted to preclude such innovative solutions to what otherwise might be intractable problems.

4. The court of appeals acknowledged that *Union Gas* is the closest precedent for this case. But instead of viewing Congress's authority to provide for suits by Tribes against States as following *a fortiori* from *Union Gas*, the court sought to distinguish *Union Gas* on two grounds. Neither distinction is substantial.

First, the court noted that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause

allows Congress to place limits on the States to "'maintain[] free trade among the States[,]' * * * 'the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the question whether Congress has the power under the Constitution to abrogate a State's immunity from suit. The critical point in *Union Gas* was that the States had ceded a portion of their sovereignty when they gave Congress the power to regulate interstate commerce. As we have already explained, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

The court of appeals also sought to limit *Union Gas* to situations in which a State engages in an activity "typical of private individuals" and "outside the typical realm of state authority." Pet. App. 22a. That limitation cannot be reconciled with this Court's decisions. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. The nature of the State's activity in *Union Gas*—owning a hazardous waste site—was not mentioned as a factor in the decision. In the Tenth Amendment context, this Court has rejected as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is * * * 'traditional.'" *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-547

(1985). A traditional governmental function test is no more appropriate in the Eleventh Amendment context.

In any event, the court of appeals erred in characterizing negotiations by a State with an Indian Tribe as within the traditional sphere of state authority. Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, 470 U.S. at 232-233. IGRA is consistent with that constitutional arrangement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

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